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## THREE REASONS WHY EVEN GOOD PROPERTY RIGHTS CAUSE MORAL ANXIETY

EMILY SHERWIN\*

Property is a vexing topic. Property rights play a central role in law and human life, but they are notoriously difficult both to define and to defend. Many ingenious arguments have been made over the years on behalf of private control of resources, but none seems fully satisfying as a justification for particular arrays of holdings or for the consequences of those holdings in hard cases.

My object in this Essay is to suggest several reasons why, entirely apart from the substantive justification for existing private property rights, property is, unavoidably, a morally uncomfortable subject. The problems I have in mind inhere in the relationship between law and morality generally, but are particularly likely to surface in the application of moral principles to property rights. As a consequence, even if private property rights are in fact morally justified, they are likely to generate moral unease.

To clarify the task, it may help to explain what the Essay is not about. I am not concerned with the validity or invalidity of any substantive theory of property rights. Nor am I concerned with the need to rank or reconcile a plurality of moral values bearing on property rights, although I shall comment on the relationship of property rights to multiple conceptions of justice.<sup>1</sup> Nor does my analysis turn on the potential conflict between individual self-interest and collective good, although gaps between self-interest and concern for others are sure to cause practical difficulties in designing and implementing a morally sound system of property

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1. For pluralist approaches to property, see, for example, LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS* 99-107 (1977) (explaining different justifications for property rights); STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 292-314 (1990) (describing pluralist theories as "often the only way to deal honestly with the complexity and uncertainty of moral and political life").

rights. Instead, I shall identify a series of moral fault lines that make it difficult to live in moral peace with private property, even if the governing system of property rights is morally sound.

### I. THE NATURE OF PROPERTY RIGHTS

To think intelligently about the relationship between property and morality, one must first have a working definition of property. Intuitively, and traditionally, property means control over things.<sup>2</sup> Over the course of the twentieth century, however, the legal idea of property was diluted to the point of extinction, at least in academic circles. The conceptual devolution of property rights began in scholarly writing not specifically concerned with property.<sup>3</sup> Wesley Hohfeld recast legal rights as paired sets of jural relations between persons.<sup>4</sup> Ronald Coase characterized causation as a bilateral conflict between activities rather than the impact of one person's acts on the property or interests of another.<sup>5</sup> Picking up on these ideas, property theorists redefined property rights as legal relations between people in regard to resources.<sup>6</sup> Some went further, arguing that because legal relations between people in regard to resources play out in a wide variety of contexts, property rights ultimately amount to the outcomes of particular disputes over resources;

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2. See WILLIAM BLACKSTONE, 2 COMMENTARIES \*\*1-2.

3. The erosion of traditional notions of property is described in Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 366-85 (2001); Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1077-80 (1997). For an excellent history of twentieth century analysis of property rights, see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 311-77 (1997).

4. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 35-64 (Walter Wheeler Cook ed., 3d ed. 1964) (1919). Hohfeld described property rights as "multital" rights, or legal relations operating in rem against a large or indefinite number of people. *Id.* at 72.

5. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2, 14 (1960).

6. See, e.g., RESTATEMENT OF THE LAW OF PROPERTY: INTRODUCTORY NOTE (1936) ("The word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing."); JOHN E. CRIBBET ET AL., *PROPERTY: CASES AND MATERIALS* 2 (8th ed. 2002) ("It appears, then, that 'ownership' consists of many disparate claims by [the owner] sanctioned by law against many persons—a 'bundle of sticks,' as legal scholars sometimes have put it."); Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 361-62, 366 (1980) (describing "the new property" of the twentieth century).

property rights exist only as the products of case-by-case decision making by legal officials.<sup>7</sup> At this point, nothing distinguishes property rights from legal rights generally or gives them content in advance of the transactions or events that give rise to disputes.<sup>8</sup>

This modern conception of property rights is inadequate to support the benefits we expect from a system of private property. The social functions of property rights include encouraging owners to invest effort and capital in resource development, enabling owners to plan for the future, and avoiding prisoners' dilemmas and other coordination problems that lead to mismanagement of resources.<sup>9</sup> It is possible that some degree of legal uncertainty can facilitate private bargaining and encourage efficient behavior.<sup>10</sup> Yet if property rights are nothing but the outcomes of disputes over

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7. See, e.g., Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (1964) ("Property is the end result of a process of competition among inconsistent and contending economic values.... It is ... the value which each owner has left after the inconsistencies between the two competing owners have been resolved."); Vandewelde, *supra* note 6, at 366 ("[T]he particular combination of rights that comprised property in a given case would be decided according to the circumstances."); see also LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 173-77 (2002) (suggesting that property rights are not moral entitlements but rather the outcome of political decision making within a society).

8. See Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980) (arguing that property is not a viable legal category); Vandewelde, *supra* note 6, at 361-66 (arguing that property is "merely a bundle of legal relations").

9. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32-34 (6th ed. 2003); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356-57 (1967) (noting that "[t]he development of private rights permits the owner to economize on the use of those resources from which he has the right to exclude others"); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322-32 (1993) (noting importance of individual ownership); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244-47 (1968) (providing the classic illustration of the difficulty inherent in managing common property). On the value of coordination, see, for example, JOSEPH RAZ, *THE MORALITY OF FREEDOM* 49-50 (1986); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 162-66 (1991); Gerald J. Postema, *Coordination and Convention at the Foundation of Law*, 11 J. LEGAL STUD. 165, 172-86 (1982); see also Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1006-10 (1989) (discussing the value of "indicator-rules" to guide action).

10. See Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 257-58 (1995) (suggesting that, under certain conditions, bargaining is enhanced by vaguely defined entitlements); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986) (suggesting that, under certain assumptions, a regime in which government may significantly alter property rights without compensation encourages efficient behavior by owners).

resources, there is no basis for investment, planning, and coordination, and no starting point for exchange or for judgments about harm.

Lately, however, some have moved away from the skeptical position and attempted to describe property rights in more promising ways. Thomas Merrill and Henry Smith, for example, have argued that property rights operate in rem: they are not simply bilateral relations, but rights the owner can assert against any and all others.<sup>11</sup> In other words, property rights establish a relationship of ownership between a person and a thing, as against the world at large.<sup>12</sup>

My own definition places more emphasis on the form of property rights.<sup>13</sup> A property right, in my view, has three essential elements: an object, an assignment of the object to an owner, and a range of permitted uses that provide substantive advantages to the owner.<sup>14</sup> To give property rights meaning and secure their functions, at least the first two of these elements—the object of the right and its owner—must be determinate enough to be ascertainable in advance of a conflict over the resources in question.

When the object of a property right is a physical thing, the properties of the thing itself give it determinate form.<sup>15</sup> Nonphysical objects—legal “things”—derive their form from determinate legal rules.<sup>16</sup> Thus, a lease, an easement, a copyright, or a share of stock can be an object of property if it is defined, by agreement or by law, in easily comprehensible and uncontroversial terms.<sup>17</sup>

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11. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 777, 780-89 (2001); Merrill & Smith, *supra* note 3, at 359; *see also* HOHFELD, *supra* note 4, at 72-74 (discussing “multital rights”); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 25-31 (1997) (discussing the in rem nature of property rights).

12. *See* Merrill & Smith, *supra* note 11, at 777.

13. For a lengthier explanation, *see* Sherwin, *supra* note 3, at 1084-101.

14. *Id.* at 1087-88.

15. *See id.* at 1091.

16. *See id.* at 1088.

17. This assertion rests on the entirely plausible view that, at least within an important core of application, language is capable of conveying determinate meaning. *See, e.g.*, KENT GREENAWALT, *LAW AND OBJECTIVITY* 34-89 (1992) (discussing determinate standards and principles); H.L.A. HART, *THE CONCEPT OF LAW* 132-44 (1961) (discussing how rules limit discretion); SCHAUER, *supra* note 9, at 53-68 (discussing of rules and rule-following); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 571-72 (1993) (discussing the determinate meaning of language); *see also* Lawrence B. Solum,

Assignment of an object of property to an owner is also a function of legal rules; the assignment is determinate if the conditions of legal ownership are spelled out in clear terms. Property rights, as defined here, can be owned by individuals or in common.<sup>18</sup> Property rights in a physical thing can be divided among owners, as in the case of an easement and a fee in a parcel of land, as long as each “piece” of the resource is a determinate legal thing assigned to an ascertainable owner (or owners).<sup>19</sup>

Permissible uses present a more difficult problem. Legal rules do not always make clear in advance of controversy the uses an owner can make of his or her property, or the ways in which others, or the government, may interfere. One example of indeterminacy in the definition of permissible use is the law of nuisance, which often calls for an ex post balance of conflicting private and public interests;<sup>20</sup> another is the “essentially ad hoc” law of regulatory takings developed by the Supreme Court.<sup>21</sup>

To avoid pointlessness, property rights must protect at least some core of available uses, defined in a determinate way either by legal doctrine or by reliable social and political norms. Beyond this, however, indeterminacy with regard to use may affect the utility of property rights,<sup>22</sup> but it does not destroy their character as property rights, distinct from other legal relations.<sup>23</sup> Determinate legal rules defining objects of property and conditions of ownership guarantee

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*On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 476-81 (1987) (responding to skepticism).

18. In situations of open access, however, there are no property rights because ownership is not assigned. This is as it should be, because open access does not perform the social functions associated with property rights. See, e.g., Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1194-98 (1999) (discussing open access and anticommons as beyond the boundaries of property).

19. See MUNZER, *supra* note 1, at 23 (describing easements as “limited property” that “does not amount to ownership”).

20. See RESTATEMENT (SECOND) OF TORTS §§ 822, 826 (1979) (comparing gravity of harm to utility of conduct).

21. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-32 (1992), the Court moved in the direction of greater determinacy in its takings analysis, but more recently it has significantly limited the effect of *Lucas*. See *Tahoe-Sierra*, 535 U.S. at 324 n.19.

22. See *supra* note 10 and accompanying text.

23. See *supra* notes 18-19 and accompanying text.

that the designated owner is entitled to whatever substantive benefits the law allows for the object in question.<sup>24</sup> General, determinate rules also ensure that the benefits of ownership of any defined class of legal things are available to all owners of objects within the class, as against all others who might interfere.<sup>25</sup> The full range of permissible uses attached to a class of legal things may remain uncertain, but to the extent that permissible uses have in fact been identified by rules or by general understanding, the owner is free to choose among them and others who oppose the owner's choice must marshal a legal argument against it.<sup>26</sup>

Property rights, therefore, consist of legal rules that define a determinate object of property, assign the object to an ascertainable owner, and provide for a range of available uses, at least some of which are defined and protected by determinate rules. Understood in this way, property rights provide a conceptual foundation for both private exchange and claims of wrongful harm. Functionally, they provide coordination and the sense of ownership necessary to secure the social benefits of a system of private property.

My definition of property rights sounds rather different from Merrill and Smith's characterization of property rights as rights in rem.<sup>27</sup> In fact, however, the two are closely related because generality and determinacy are the features of property rights that enable them to operate in rem.<sup>28</sup> To be effective against an indefinite number of potential infringers, property rights must pertain to recognizable objects and apply in like manner to classes of situations. Rights in rem, in other words, must be embodied in determinate rules, and determinate rules connecting control of particular resources to individuals tend to produce rights in rem.<sup>29</sup> Accord

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24. See Sherwin, *supra* note 3, at 1085.

25. *Id.*

26. *Id.* at 1087-90.

27. Compare *supra* Part I with Merrill & Smith, *supra* note 11, at 783-89.

28. A possible point of divergence between the definition of property proposed by Merrill and Smith, and my definition as stated in previous work, is the status of determinate contract right (such as pay \$100 on February 1). Merrill and Smith provide persuasive reasons for special treatment of rights that operate in rem. See Merrill & Smith, *supra* note 3, at 385-97 (summarizing advantages of attention to the in rem character of property rights for purposes of economic analysis). I continue to believe, however, that the most fundamental characteristics of property rights are their determinacy and prospective effect.

29. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of*

ingly, these two ways of understanding property rights have much in common.

Working from my definition, property rights have two structural attributes that bear on the problem of moral justification. First, as indicated, property rights are rule-governed.<sup>30</sup> The objects of property rights, their assignment to owners, and at least some of the practical benefits they carry, must be determinate, and determinacy typically comes either from legal rules or from private agreements backed by legal rules.<sup>31</sup> Second, and relatedly, property rights operate prospectively.<sup>32</sup> Because they are embodied in general, determinate rules, property rights predate their application to particular disputes over resources.<sup>33</sup> Retrospective adjudication of disputes, in cases not governed by preexisting determinate rules, may *create* property rights if adjudicative decisions have precedential effect, but retrospective adjudication does not *implement* or *vindicate* existing property rights. These two aspects of property rights—their dependence on rules and their prospective effect—complicate their relationship to morality in ways that will emerge in the following discussion.

## II. MORAL DILEMMAS OF PROPERTY

Our legal system defines and protects private property rights. The distribution of property rights recognized by law reflects a combination of historical events of private occupancy, exchange, and various efforts at partial redistribution carried out by government.<sup>34</sup> The outcome is far from egalitarian and not easily explained by any sensible principle of patterned distribution.<sup>35</sup>

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*Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24-58 (2000) (discussing the role of standardized forms of ownership and determinate rules of trespass and nuisance in managing information costs in a regime of in rem property rights); Merrill & Smith, *supra* note 3, at 387-88, 394-97 (same).

30. See *supra* notes 24-25 and accompanying text.

31. See Sherwin, *supra* note 3, at 1088-89.

32. *Id.* at 1085.

33. See *id.*

34. See ALEXANDER, *supra* note 3, at 311-77.

35. See, e.g., BECKER, *supra* note 1, at 116-18 (recommending significant alterations of existing property rights); MUNZER, *supra* note 1, at 227-30, 241-53 (elaborating a principle of distributive justice); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 423-45 (1988)



Efforts to defend this state of affairs have produced a variety of moral arguments for private property. Private property rights are said to follow from a natural endowment in one's labor;<sup>36</sup> from the moral desert that arises from labor;<sup>37</sup> from the relation of property to personal identity;<sup>38</sup> or from the requirements of individual liberty and autonomy.<sup>39</sup> Alternatively, rules establishing property rights are said to be justified by the instrumental contributions they make to utility or human welfare,<sup>40</sup> or, more narrowly, to economic and political liberty within a society.<sup>41</sup>

One or more of these arguments, alone or in concert, may or may not be successful in justifying the institution of private property and some or all specific property rights protected by law. I shall set this obviously critical question aside. The point I hope to make is that even if property rights are morally justified, private property is likely to generate moral unease.

There are at least three reasons why this is so. First, legal property rights are and must be the products of determinate legal rules.<sup>42</sup> As such, they inevitably will diverge in some of their applications from the moral principles that support them. Second, property rights suffer, more than other legal rights, from problems of transition. Most or all justifications for private property envisage

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(arguing that moral theories of property rights require a significantly more egalitarian distribution of property rights).

36. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 25-51, at 303-20 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690). For analysis of the Lockean argument, see BECKER, *supra* note 1, at 33-48, and WALDRON, *supra* note 35, at 137-252.

37. See BECKER, *supra* note 1, at 48-56; MUNZER, *supra* note 1, at 254-91.

38. See G.W.F. HEGEL, PHILOSOPHY OF RIGHT §§ 41-71, at 40-57 (T.M. Knox trans., Oxford Univ. Press 1952) (1821); WALDRON, *supra* note 35, at 343-89; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971-78 (1982). For analysis of Hegel-inspired theories of property, see MUNZER, *supra* note 1, at 67-87.

39. See WALDRON, *supra* note 35, at 293-313; Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1251-65 (2005).

40. See BECKER, *supra* note 1, at 57-74; JEREMY BENTHAM, THE THEORY OF LEGISLATION 109-13 (C.K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802); MUNZER, *supra* note 1, at 191-226.

41. See BECKER, *supra* note 1, at 75-80; see also MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7-21 (1962) (emphasizing the freedom-promoting principles of a free market society).

42. See Sherwin, *supra* note 3, at 1085.

secure rights on which people can and will rely.<sup>43</sup> As a result, preserving rights that are not morally justifiable at their point of origin may have genuine moral value. Finally, property rights expose fundamental conflicts among the different conceptions of justice—distributive, corrective, and retributive—that guide law.<sup>44</sup>

### *A. The Dilemma of Rules*

Determinacy is an essential feature of property rights as I have defined them. The resources covered by the right, the assignment of those resources to an owner, and at least some of the uses the owner can make of his or her resources, must be specified in advance, before the right is applied to particular disputes.<sup>45</sup> The determinacy of property rights enables them to provide a variety of individual benefits, such as planning and coordination.<sup>46</sup> Whether or not these benefits have moral value in their own right, and whether or not they are outweighed by the moral costs of private control over resources, they are what we have come to expect from property rights.

Except when a physical object determines its own boundaries, the determinacy of property rights normally is a function of legal rules.<sup>47</sup> A rule, for this purpose, is a directive prescribing what should be done in a class of situations.<sup>48</sup> Behind every rule is a purpose: the rule's prescription is supposed to further a certain end or implement a higher-level principle.<sup>49</sup> The rule's function, however, is to settle disagreement or uncertainty about what action the end or principle in question requires.<sup>50</sup> Accordingly, a rule

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43. See *supra* note 9 and accompanying text.

44. See *infra* Part II.C.

45. See Sherwin, *supra* note 3, at 1085.

46. Demsetz, *supra* note 9, at 356-57.

47. See Sherwin, *supra* note 3, at 1088.

48. See SCHAUER, *supra* note 9, at 23-27. For further discussion of the nature, function, and problems of authoritative rules, see LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 53-95 (2001); JOSEPH RAZ, *THE AUTHORITY OF LAW* 16-19, 22-23, 30-33 (1979); RAZ, *supra* note 9, at 57-62; Schauer, *supra* note 9, at 42-52, 77-134.

49. See ALEXANDER & SHERWIN, *supra* note 48, at 53-54.

50. See *id.* at 11-15; see also MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 4-7 (1988) (defending an "enrichment model" of the common law); JOSEPH RAZ, *ETHICS IN THE*

cannot simply restate the end or principle on which it is based; it must prescribe, in determinate and uncontroversial terms, an outcome or course of action that will serve that end or principle in most of the cases covered by the rule.<sup>51</sup> It follows that the set of actions required by the rule will not exactly match the set of actions best calculated to meet the rule's purpose in each and every case to which the rule applies.<sup>52</sup> Rules serve their ends indirectly and imperfectly, on the suppositions that imperfection is preferable to controversy, and that those subject to the rule will in fact make fewer errors overall if they follow the rules than they would make if they judged for themselves what would best serve the rule's purpose or principle in each case.<sup>53</sup>

The point to be drawn from this brief discussion of rules is that property rights defined by determinate rules will diverge in some of their applications from whatever moral purposes or principles motivate them. Given the possibility of moral error in case-by-case decision making, a determinate legal property right may be the best practical means for accomplishing moral ends or implementing moral principles. Nevertheless, the rules will sometimes produce morally unsatisfactory results.<sup>54</sup>

Suppose, for example, that a rule-making authority aims to maximize human welfare, and suppose further that welfare maximization is a morally important objective. The authority concludes that, under a given set of geological conditions, private property rights in water will advance welfare. Accordingly, the authority enacts a prior appropriation rule for nonnavigable surface water: individuals who divert water for uses of their choosing have priority over subsequent appropriators in a quantity of water measured by the initial diversion.<sup>55</sup>

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PUBLIC DOMAIN 187-92 (1994) (defending an "institutional approach" to law).

51. ALEXANDER & SHERWIN, *supra* note 48, at 53.

52. See SCHAUER, *supra* note 9, at 31-34, 48-52.

53. See RAZ, *supra* note 9, at 70-80 (discussing the "normal justification" of rules).

54. See ALEXANDER & SHERWIN, *supra* note 48, at 55-61.

55. See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); see also RESTATEMENT (SECOND) OF TORTS ch. 41, Scope Note (1979) (discussing prior appropriation). Riparian rights of reasonable use are not private property rights by my standards. See *id.* § 850. They might, however, amount to a property right in common if the class of riparian owners entitled to reasonable use is well defined.

Assume that, overall, the authority's rule is morally sound. Water is scarce and essential to life and commerce. In the absence of well-defined property rights, potential users of water—even those who accept the principle of welfare maximization and do their best to implement it—would often err in judging the importance of different water uses and estimating what other water users are likely to do.<sup>56</sup> The prior appropriation rule, therefore, will produce better results overall than unregulated case-by-case decision making. Nevertheless, the rule will cause a loss of welfare in some situations, as when the first appropriator of water uses it less efficiently than subsequent appropriators might have done.

The dilemma of rules, therefore, is this: a well-crafted rule, if generally followed, may cause a net gain in welfare; at the same time, the rule will produce results that are imperfect by the same standard of welfare. Thus, from the point of view of the rule-making authority, or of anyone taking an overview of prior appropriation, it is morally correct to grant property rights to prior appropriators and require all others to respect the prior appropriators' rights. Yet, from the point of view of any actor who judges prior appropriation rights to be inefficient in a particular case, respecting the right will appear morally incorrect.<sup>57</sup>

This effect of rules is easiest to see when the governing moral principle is a consequentialist principle such as welfare maximization. Yet the point applies to deontological moral principles as well.<sup>58</sup> Suppose that the property right granted to prior appropriators of water is based on the appropriator's moral entitlement to the fruits of his or her labor, or is judged to be a fitting reward for the labor of appropriation. As long as there is room for disagreement over the scope of any appropriator's entitlement, the appropriate reward for appropriative labor, or the moral implications of others' interests in appropriating water, rules will be necessary to settle

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56. Determinate rules are necessary even when rule subjects endorse the same abstract moral principles and are motivated to act on them. Even under the best conditions of moral harmony, reasoning errors and lack of coordination will lead to morally incorrect actions. See ALEXANDER & SHERWIN, *supra* note 48, at 232 n.4; Gregory S. Kavka, *Why Even Morally Perfect People Would Need Government*, 12 SOC. PHIL. & POL'Y 1 (1995).

57. See ALEXANDER & SHERWIN, *supra* note 48, at 54; SCHAUER, *supra* note 9, at 128-34; Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695, 695-96 (1991).

58. See ALEXANDER & SHERWIN, *supra* note 48, at 91-92.

controversy.<sup>59</sup> To settle controversy effectively, the rules will need to define the appropriator's moral right in determinate terms. And the property right, so defined, will sometimes call for morally incorrect results.<sup>60</sup> When this occurs, participants and observers are likely to find the consequences of prior appropriation rights morally distasteful, despite the overall moral benefits prior appropriation rights produce.

### *B. The Problem of Time*

Property rights operate prospectively and tend to remain in place over time.<sup>61</sup> Their resistance to change is tied to their social functions: political authorities enact rules of property to settle controversy, provide coordination, and otherwise avert error.<sup>62</sup> To serve these purposes effectively, property rights must be fixed in advance of particular disputes, and the rules that define them must be reasonably stable over time.

The prospectivity and stability of property rights may account for a phenomenon that Jeremy Waldron has called the "normative resilience" of property.<sup>63</sup> Waldron observes that we make various judgments about conduct based on property rights that appear to be independent of our judgments about the institution of property itself.<sup>64</sup> For example, we treat deliberate, unauthorized takings of property as dishonest regardless of our views about the justice or injustice of property rights generally or the set of holdings they protect. Moreover, property rights are especially resilient in this way; judgments based on property rights are more likely than judgments based on other institutions—for example, religion, marriage, and aristocracy—to withstand negative conclusions about the justice of the institution that supports them.<sup>65</sup>

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59. *See id.*

60. *See id.* at 92.

61. *See supra* notes 32-33 and accompanying text.

62. *See supra* note 9 and accompanying text.

63. *See* Jeremy Waldron, *Property, Honesty, and Normative Resilience*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 10, 12-17 (Stephen R. Munzer ed., 2001).

64. *Id.* at 12.

65. *Id.* at 21-31.

The connection between normative resilience and the prospective character of property rights is this: once determinate, prospective property rights are in place, they take on, as Waldron says, “a moral life of their own.”<sup>66</sup> People build family lives and businesses in the expectation of control over a type and quantity of resources. They endow their holdings psychologically, placing more value on keeping them than they might have placed on acquiring the same holdings initially.<sup>67</sup> They put resources to personally important uses and are proud of what they do with them. In other words, legal property rights become integrated into people’s lives in ways that may be morally significant. Accordingly, loss of property, or even the threat of loss, has a significant impact on happiness, objective welfare, liberty, and maybe even personal identity.<sup>68</sup>

Of course, those who lack resources have an interest in property ownership as well.<sup>69</sup> Reliance aside, resources are likely to generate more welfare when placed in the hands of those who formerly had few.<sup>70</sup> Moreover, the arguments for redistribution are not limited to welfare: redistribution from those who have plenty to those who do not may provide transferees with a wider range of choice and greater breadth for personal development.<sup>71</sup> A more equal distribution of goods may also be more just in and of itself. Yet, if we take into account the effects of reliance and endowment, the costs of abrupt and significant redistribution are enormous.<sup>72</sup>

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66. *Id.* at 25.

67. See Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991); Jack L. Knetsch & J.A. Sinden, *Willingness To Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q.J. ECON. 507 (1984); Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1551-53 (1998).

68. See Waldron, *supra* note 63, at 21-28 (discussing the psychological effects of ownership). On the problem of transition, see generally Conference, *Legal Transitions: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change?*, 13 J. CONTEMP. LEGAL ISSUES 1 (2003) (debating the benefits of legal change).

69. For analysis of the distributive implications of both special-rights and general-rights theories of property, see WALDRON, *supra* note 35, at 423-45.

70. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 55-56, 80 (1981) (discussing the effects of “diminishing marginal utility” of wealth in utilitarian theory).

71. See WALDRON, *supra* note 35, at 439 (arguing that property ownership encourages the “development of prudence, thrift, and responsibility”).

72. See Waldron, *supra* note 63, at 24.

Waldron presents the normative resilience of property rights as a moral puzzle. Normative resilience, as he describes it, represents an inconsistency or "logical gap" between "Type 1" judgments (judgments about the justification of property rights) and "Type 2" judgments (judgments about conduct, based on property rights),<sup>73</sup> which in turn raises questions about the enterprise of moral justification.<sup>74</sup> I doubt that the difference between Type 1 and Type 2 judgments entails a logical inconsistency; nevertheless, the discrepancy between the initial moral status of property rights and their moral status after a period of time is likely to result in moral discomfort.

There are several ways to think about the normative resilience of established property rights. Suppose, as Waldron suggests, that people commonly make moral judgments based on property rights although they question the justice of property as an institution. Asked to assess the set of holdings currently protected by property law, they might conclude that current holdings do not represent a fair pattern of distribution, nor were they justly acquired.<sup>75</sup> In response to an act of misappropriation, however, the same people might assert that they are entitled to their holdings and that anyone who attempts to appropriate their holdings, or the holdings of others, is a thief.

The apparent discrepancy between these judgments may simply reflect a conflict between impartial morality and self-interest, coupled, perhaps, with a sense of solidarity with other owners.<sup>76</sup> People are personally attached to their rights over things for prudential reasons that carry no moral weight.<sup>77</sup> This attitude

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73. *Id.* at 12-13.

74. Waldron concludes that the divergence between Type 2 and Type 1 judgments may be justified, based on the expectations and personal attachments generated by positive law and the centrality of property to social order: a violation of property rights signifies disdain for the "social fabric" itself. *Id.* at 21-31. Yet he also suggests that the presence of normative resilience makes efforts to justify—and, if necessary, to reform—the institution of property more rather than less important. *Id.* at 31-35.

75. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149-60 (1974) (discussing patterned and nonpatterned theories of distributive justice).

76. See MURPHY & NAGEL, *supra* note 7, at 177-81.

77. See BERNARD WILLIAMS, *God, Morality, and Prudence*, in *MORALITY: AN INTRODUCTION TO ETHICS* 68, 71-77 (1972) (maintaining that some distinction between "the moral and the prudential" is necessary to make sense of morality, but that "an exclusive

presents a practical obstacle to achievement of a just system of property rights that may be insurmountable. It does not, however, involve a moral conflict or a logical gap between judgments.

Alternatively, both judgments may be valid moral judgments. Existing property rights may be morally unjust, as measured by a patterned standard of distributive justice or by historical standards of justice in acquisition and justice in transfer. At the same time, disruption of established legal property rights may be a moral wrong to those who have arranged their lives around them. If this is the case, the question becomes which of two wrongs—the wrong of distributive injustice or the wrong of expropriation—is graver.

One possible answer is that the wrongs of distributive injustice and expropriation are incommensurable in the sense that no metric or scale permits a comparison of the values at stake.<sup>78</sup> If so, then, although they may not be morally equal, neither can be judged to be morally better or worse than the other and no choice between them can be morally justified.<sup>79</sup> Normative resilience reflects this state of affairs: we choose to protect existing holdings because expropriation is wrong, and our Type 2 judgments are based on this choice. Yet, because the distributive justice that results is no less wrong, we also form Type 1 judgments about the injustice of the institution of property. Moral dissatisfaction with property rights is an obvious result.

A second answer is that the choice between expropriation and distributive justice presents a moral dilemma: the distributive injustice that results from a decision to protect current holdings is morally wrong, even if expropriation would be a more serious wrong.<sup>80</sup> On this view, a morally correct choice is possible, but it does not alter the wrongful character of the course of action

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disjunction between the prudential and the moral" is "quite unrealistic").

78. See RAZ, *supra* note 9, at 321-66 (defending the possibility of incommensurable moral choices). For a sampling of views in the debate over incommensurability, see generally Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998).

79. See RAZ, *supra* note 9, at 322-26. For a persuasive argument that if, in fact, values are incommensurable, choices between them cannot be morally justified, see generally Ruth Chang, *Comparison and the Justification of Choice*, 146 U. PA. L. REV. 1569 (1998).

80. See RAZ, *supra* note 9, at 359, 363 (discussing moral dilemmas in which the morally right choice is wrongful).



chosen.<sup>81</sup> Correct resolution of the dilemma carries with it a moral "remainder."<sup>82</sup> If this position is coherent,<sup>83</sup> normative resilience is readily explicable. Type 2 judgments reflect the determination that protecting existing holdings at the cost of distributive injustice is morally right; Type 1 judgments reflect the understanding that current holdings are nonetheless unjust. Again, moral dissatisfaction with property rights is sure to follow.

For those who reject both incommensurability and the possibility of moral dilemmas, normative resilience and moral discomfort with property rights are harder to explain. On this view, the wrongs of distributive injustice and expropriation can and must be compared, either lexically or according to a common metric, and when this has been done, the decision that follows is morally correct.<sup>84</sup> If in fact distributive injustice is the graver wrong, Type 2 judgments are moral errors, perhaps abetted by self-interest.<sup>85</sup> If expropriation is the graver wrong, Type 2 judgments follow from the all-things-considered conclusion that property rights should be upheld. A Type 1 judgment that the institution of property is unjust probably is best explained as an expression of belief in the ideal of distributive justice, and of regret that the passage of time has made it necessary to sacrifice that ideal in the interest of more pressing moral concerns.

Without taking a stand in the debate over incommensurability, I find this last explanation of normative resilience to be plausible. We do compare values and make choices in matters of political morality.<sup>86</sup> We view those choices as capable of justification, and, when they are justified, we believe that acting on them is morally correct. At the same time, we are likely to feel that choices between moral values carry a moral cost in that one value is set aside. In other words, moral remainder may exist as a psychological, if not an analytical, fact. If so, any determination that present holdings

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81. BERNARD WILLIAMS, *Ethical Consistency*, in PROBLEMS OF THE SELF 166, 170-75 (1973).

82. *Id.* at 179.

83. Chang's argument suggests otherwise. See Chang, *supra* note 79, at 1569-73, 1588-91.

84. See, e.g., Larry Alexander, *Banishing the Bogey of Incommensurability*, 146 U. PA. L. REV. 1641, 1644-46 (1998) (finding moral comparison to be both possible and necessary).

85. See *supra* note 76 and accompanying text.

86. See MURPHY & NAGEL, *supra* note 7, at 177-81.

must prevail over distributive fairness will be accompanied by moral unease.

### *C. Conflicting Ideals of Justice*

The moral difficulties that arise when people rely on determinate property rights over time may be an instance of a more general disharmony among ideals of justice. Three forms of justice—retributive, corrective, and distributive—are commonly supposed to motivate a morally defensible legal system.<sup>87</sup> These three ideals, however, can work at cross-purposes.

Retributive justice and corrective justice come into play when individuals injure one another or violate each other's rights.<sup>88</sup> Corrective justice requires compensation for wrongful harm, variously defined.<sup>89</sup> Retributive justice ties penalties imposed on wrongdoers to moral blameworthiness, variously defined.<sup>90</sup>

Distributive justice refers to the basic division of resources among members of a society.<sup>91</sup> Theories of distributive justice vary widely. Using Robert Nozick's terms, some distributive theories are

87. The following discussion draws from Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 L. & PHIL. 1, 2-11 (1987).

88. Corrective justice and retributive justice can conflict when the extent of harm an injurer imposes on a victim does not correspond to the injurer's blameworthiness. See JULES L. COLEMAN, RISKS AND WRONGS 324-25 (1992); Alexander, *supra* note 87, at 4-5; Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473, 473-74 (1974) (arguing that the doctrine of contributory fault is inconsistent with retributive justice).

89. For arguments that responsibility follows from agency and causation, see, for example, COLEMAN, *supra* note 88, at 324, 374-75; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) [hereinafter Epstein, *Subsequent Pleas*]; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 158-60 (1973); Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in TORT THEORY 24, 25-26 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993).

90. See, e.g., ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 374-80 (1981) (explaining retribution as a means of connecting the wrongdoer to correct moral values); Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111, 122-47 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (explaining retribution as a means of affirming the value of the victim); Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 182 (Ferdinand Schoeman ed., 1987) (defending retribution as good in itself); Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 482-86 (1968) (explaining retribution as a balance of moral accounts).

91. See *supra* notes 34-35 and accompanying text.

“patterned.”<sup>92</sup> Patterned theories may hold that resources should be distributed, or redistributed, to achieve a certain end state, such as equal shares or equal shares except insofar as unequal shares will bring about an improvement in the position of those who are worst off.<sup>93</sup> Alternatively, patterned theories may hold that resources should be distributed according to characteristics of the holders, such as intelligence; or that resources should be distributed on the basis of past actions that deserve reward.<sup>94</sup> Consequentialist theories may also have implications for patterns of resource distribution: resources might be distributed so as to maximize future welfare, or to maximize welfare with priority given to the welfare of those who are worst off.<sup>95</sup>

Other theories of distributive justice are historical rather than patterned.<sup>96</sup> Nonpatterned historical theories of entitlement hold that current holdings are just if they were fairly acquired.<sup>97</sup> In other words, justice in acquisition and transfer, rather than the justice of any current pattern of holdings, is the focus of moral concern.

Working within the most common and plausible conceptions of retributive, corrective, and distributive justice, a brief analysis will show that discord among the forms of justice is likely.<sup>98</sup> Moreover, discord among the forms of justice is most evident in the context of disputes about property. When such conflicts occur, the problems of commensurability and moral dilemma discussed above are once again in play.<sup>99</sup> In this Section, I shall assume that the values at

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92. The taxonomy used here is, roughly, Robert Nozick's. See NOZICK, *supra* note 75, at 156-57.

93. See JOHN RAWLS, A THEORY OF JUSTICE 75 (1971); see also MUNZER, *supra* note 1, at 241-53 (proposing a principle that would ensure a minimum level of resources to all and limit permissible inequality).

94. See BECKER, *supra* note 1, at 81-86 (discussing the view that property should belong to those who are worthy of ownership).

95. See, e.g., Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339, 343-45 (2000) (describing prioritarianism and “responsibility-catering prioritarianism”).

96. See NOZICK, *supra* note 75, at 150-53.

97. *Id.* at 153.

98. Some variants of retributive, corrective, and distributive justice may be mutually reconcilable. For example, a patterned theory of distributive justice based exclusively on moral desert might be reconcilable with retributive justice, but retributive principles would control and distributive justice would not survive as a freestanding ideal. See Alexander, *supra* note 87, at 4.

99. See *supra* text accompanying notes 78-85.

stake are capable of comparison and that conflicts can be resolved by fixing moral priorities. Nevertheless, tradeoffs in the currency of justice are likely to contribute to moral dissatisfaction with property rights.

Friction among the three forms of justice is easiest to see when the community has adopted a nonconsequentialist patterned principle of distributive justice, because both corrective justice and retributive justice upset patterns of distribution.<sup>100</sup> To see this, suppose that the governing distributive principle holds that each member of the community should have an equal share of the external goods important to human life, and suppose further that the community has achieved this ideal. At this point, an injury occurs: one person harms another in such a way that the principle of corrective justice requires compensation. Unless the injurer realized a gain precisely equal to the victim's loss, compensation will result in unequal shares of goods. In a simple case of theft, the injurer's gain may in fact mirror the victim's loss, although even here the victim's temporary loss, and the cost to the victim of obtaining compensation, may not match the costs incurred by the wrongdoer in defending against the victim's claim and providing compensation. In the more typical case of accidental infliction of harm, gain and loss are likely to diverge substantially, resulting in significantly unequal shares of goods after corrections are made.<sup>101</sup> Similarly, retributive penalties imposed on the injurer will alter the ideal distributive pattern unless the injurer's retributive desert is equal to the victim's loss, *and* the injurer realized a gain equal to the victim's loss, *and* the penalty is remitted to the victim.<sup>102</sup>

In these circumstances, if the patterned distributive ideal takes precedence, there is almost no room at all for principles of corrective and retributive justice to operate. If, on the other hand, corrective and retributive justice take priority, the community's distributive

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100. See Alexander, *supra* note 87, at 6-7; see also NOZICK, *supra* note 75, at 160-64 (noting that voluntary exchange upsets distributive patterns).

101. A negligent driver, for example, saves the cost in time and money of greater care, but these saved costs are unlikely to match the costs incurred by a pedestrian the driver happens to hit. See COLEMAN, *supra* note 88, at 370.

102. Even then, the penalty imposed on the injurer may affect the holdings of the injurer's innocent family members.

ideal must give way.<sup>103</sup> It may be that the morally best choice is to give precedence to compensation for injuries and punishment of wrongdoers, as our legal system does. Yet the community will never be fully satisfied with the distribution of resources among its members.<sup>104</sup>

When distributive justice tracks a broad consequentialist principle, the distributive pattern dictated by that principle overrides all contrary considerations. Suppose, for example, that the community has settled on the principle that resources should be divided among its members in a way that will maximize aggregate human welfare, and suppose further that governing authorities have devised a means of measuring welfare. In this community, corrective justice and retributive justice cannot operate as freestanding principles of justice. A legal system that requires injurers to compensate their victims for harm done and imposes penalties on wrongdoers according to some notion of desert may in fact maximize welfare.<sup>105</sup> If so, the ideal pattern of distribution in a welfare-maximizing community will accommodate something like corrective and retributive justice. Corrective and retributive justice, however, are not the *grounds* for legal remedies; nor do they impose independent constraints on legal remedies.<sup>106</sup> If compensation or desert-based penalties conflict with the goal of welfare maximization, they must give way. If welfare can be maximized by requiring injurers to make supercompensatory payments to their victims, or by punishing innocent defendants, or even by bribing potential injurers not to inflict injuries, welfare maximization again prevails.<sup>107</sup> In a community of resolute act consequentialists, these results may seem perfectly sensible: whatever maximizes welfare is, without reservation, morally right. In an ordinary community, however, people are likely to internalize the as-if principles of corrective and

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103. See *supra* text accompanying note 100.

104. See *supra* note 75 and accompanying text.

105. See RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 9-15 (1998) (finding a correspondence between rights and utility); Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713, 714-18 (1989) (same).

106. See COLEMAN, *supra* note 88, at 287-88, 326-27.

107. See Alexander, *supra* note 87, at 2; Joel Feinberg, *The Classic Debate*, in PHILOSOPHY OF LAW 727 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

retributive justice espoused by the legal system. If so, cases in which welfare maximization trumps fair compensation or just desert will appear morally distasteful, even when they are morally correct.

The problem of moral dissatisfaction assumes a somewhat different form if the governing authority determines that the best means of maximizing welfare is to adhere without exception to what corrective justice and retributive justice would require in the absence of a principle of welfare maximization. The authority, in other words, may conclude that, given the errors that are likely to occur if legal officials attempt to maximize welfare case by case, unqualified principles of corrective and retributive justice will work indirectly to maximize welfare. The difficulty now is that, because corrective and retributive justice maximize welfare indirectly, a legal system enforcing them without exception will sometimes reach results in particular cases that contradict the community's foundational principle of welfare maximization. Thus, we are back to the problem of rules: the best welfare maximizing rules—in this case rules that exactly mimic corrective and retributive justice—will produce a certain number of morally erroneous, and therefore unsettling, results.<sup>108</sup>

As a final example, suppose the community endorses a purely historical, nonpatterned principle of distributive justice, and suppose further that current holdings meet that principle's requirements of justice in acquisition and justice in transfer. It might seem that in these circumstances corrective justice and retributive justice can operate in harmony with distributive justice.<sup>109</sup> Once justified holdings are in place, corrective justice and retributive justice are part of the continuing history that determines just entitlements at any point in time.

Yet, even a nonpatterned distributive principle may be at odds with corrective and retributive justice. One question is whether retributive justice implies a more general principle of desert-based allocation of goods and is thus inherently inconsistent with historical entitlements that are indifferent to the desert of

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108. See *supra* text accompanying note 57.

109. I set aside for this purpose inconsistencies between corrective justice and retributive justice. See *supra* note 88.

holders.<sup>110</sup> Some of the standard arguments offered to explain the origins of private property rights are desert-based,<sup>111</sup> but others are not. Locke's primary defense of private property, for example, is based not on the assumption that laborers deserve the reward of property, but on the assumption that laborers have a natural entitlement to their bodies and hence to the fruits of their labor.<sup>112</sup> Moreover, even when initial acquisition of entitlements is explained in terms of desert, the nature of the reward—exclusive control of resources that are or may become scarce—makes it impossible to reward all deserving acts with property rights.<sup>113</sup>

A more specific problem is that the forms of legal protection implied by the notion of historical entitlement may not correspond to the remedies prescribed by principles of corrective and retributive justice. To make entitlements secure, it may be necessary to provide compensatory remedies for harm that was not wrongfully inflicted or to impose criminal sanctions on nonculpable actors. Consider, for example, Joel Feinberg's backpacker puzzle:<sup>114</sup> A backpacker stranded in a blizzard comes upon a cabin. The backpacker breaks in, consumes food, and destroys furniture for firewood, all of which he must do in order to survive the storm. What the backpacker did was justified, all things considered, and the cabin owner, if present, may not have been at liberty, legally or morally, to exclude the stranded backpacker.<sup>115</sup> At the same time, intuition suggests that the backpacker must compensate the owner of the cabin for the harm he caused; otherwise, ownership would mean nothing in the face of others' needs, and others will always have needs.<sup>116</sup> To explain compensation from the backpacker to the cabin owner as an instance of corrective justice, one must say that a duty to compensate arises when an injurer infringes, but does not

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110. See Alexander, *supra* note 87, at 3 (questioning whether retributive justice is "consistent with the existence of a distributive system not based on moral merit").

111. See BECKER, *supra* note 1, at 48-56; MUNZER, *supra* note 1, at 254-91.

112. LOCKE, *supra* note 36, at 305-06; see WALDRON, *supra* note 35, at 177-91.

113. See BECKER, *supra* note 1, at 54-55; MUNZER, *supra* note 1, at 267-75; WALDRON, *supra* note 35, at 204, 209-10.

114. Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right of Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978). Jules Coleman provides a similar illustration in which a diabetic takes insulin belonging to another. See COLEMAN, *supra* note 88, at 282-83, 292.

115. See COLEMAN, *supra* note 88, at 300-01.

116. See *id.* at 302; Feinberg, *supra* note 114, at 102.

violate, a right;<sup>117</sup> or that harm itself generates a duty to compensate without the need for a wrong.<sup>118</sup> These explanations, however, are circular in the sense that the duty to compensate is defined by the entitlement itself: corrective justice has no independent normative role.<sup>119</sup> Moreover, to the extent that corrective justice, like retributive justice, acts as a constraint on the burdens that law can justly place on injurers, compensation to the cabin owner exceeds that constraint: an actor who has done the right things is made to pay.<sup>120</sup>

A similar point can be made in connection with criminal sanctions. Criminal penalties for intentional taking or destruction of property may be necessary to make historical entitlements meaningful: the threat of penalties gives the owner effective control by discouraging others from using the resources in question without the owner's consent.<sup>121</sup> In exigent circumstances, however, appropriation may not be morally wrong. It follows that criminal penalties for the appropriation are not supportable on retributive grounds. Larry Alexander provides this example:

A, a mean-spirited person, has an entitlement (through inheritance, say) to a rowboat. B, a child, is drowning. C takes A's rowboat over A's protest to rescue B, thus violating A's rights. C's act is "wrong," but what is C's culpability? C deserves praise and reward, not blame and punishment, although C violated a right.<sup>122</sup>

Again, the result is a moral conflict: either the governing principle of distributive justice is dishonored, or punishment is inflicted on a person who has done the right thing. One conception of justice

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117. See COLEMAN, *supra* note 88, at 282, 299-302; Feinberg, *supra* note 114, at 102.

118. See Epstein, *A Theory of Strict Liability*, *supra* note 89, at 160; see also Epstein, *Subsequent Pleas*, *supra* note 89 (arguing for "an alternative to the law of negligence within the tradition that views the tort law as a system of corrective justice").

119. See Alexander, *supra* note 87, at 4-11.

120. See COLEMAN, *supra* note 88, at 387-95 (implying that corrective justice places some constraints on allocation of the costs of injuries, but only very weak constraints).

121. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972).

122. Alexander, *supra* note 87, at 3.



must give way to the other, and the choice between them is likely to produce a sense of moral regret.

To summarize, under most or all plausible versions of distributive justice an ideal distribution of goods will sometimes conflict with other ideals of justice. When this occurs, the community must choose which aspect of justice should take priority, either generally or in specific settings.<sup>123</sup> If there is in fact such a thing as moral regret in the wake of morally correct decisions, choices of this kind are likely to result in moral discomfort with property rights.<sup>124</sup>

Conflicts among the different forms of justice that motivate law are, of course, a problem for law generally and not just for the law of property. Disputes over property rights, however, are likely to reveal these conflicts in a way that tort or contract disputes are not. Legal rules in the fields of tort, crime, and contract focus on transactions: given the current distribution of goods, how can we reduce accident costs, compensate injuries, deter wrongdoing, impose just punishment, encourage efficient trade, or honor intentions? In contrast, property law necessarily confronts the problem of distribution because it assigns control of particular resources (physical things or legal things) to owners. Property law also bears on transactions, insofar as property rights define harm and provide the basis for trade. Because property rights simultaneously implicate distributive, corrective, and retributive justice, they are likely to expose the fault lines among ideals of justice and to incur moral discredit when those ideals collide.

### CONCLUSION

The formal requirements of property rights, the effects of reliance on property rights over time, and conflicts among the different ideals of justice implemented through property rights mean that property rights are morally imperfect even when morally justified. This is not to suggest that the current array of property rights is the morally best set of rights possible; the point is that even the best set of property rights would still be morally unsatisfying in some ways.

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123. See MUNZER, *supra* note 1, at 78-83.

124. See *supra* Part II.A.

As a consequence, actors implementing property rights and judges enforcing property rights must either accept some morally regrettable outcomes in order to maintain the moral benefits of property; or disregard property rights when regrettable outcomes occur and, in doing so, lose the moral benefits of property. Accepting regrettable outcomes is morally distasteful, but pursuing ideal outcomes is morally suboptimal. This is a general problem for law, but one whose effect on property rights, as I have defined them, is especially pronounced.

